

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 45, AFL-CIO

and

Case 31-CB-11695

ADELPHIA COMMUNICATIONS CORP.

Nkwo Cheaney, Esq., for the General Counsel.

Emily Keimig, Esq., (*Sherman & Howard, LLC*)
of Denver, Colorado, for the Employer.

Michael Posner, Esq., (*Posner & Rosen, LLP*)
of Los Angeles, California, for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Los Angeles, California, on March 14, 2005. The charge was filed October 18, 2004¹ by Adelphia Communications Corp. (the Employer) and the complaint was issued December 23. The complaint as amended at the hearing alleges that the International Brotherhood of Electrical Workers, Local 45, AFL-CIO (the Union) violated Section 8(b)(1)(A) of the Act by threatening an employee with job loss and a fine for filing and supporting a decertification petition. The Union filed an answer denying that it had violated the Act. The Union also denied the agency status of Ken Hudgins, a union steward; it admits the agency status of Rick Rogers, the Union's business representative.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Employer, and Union, I make the following.

Findings of Fact

I. Jurisdiction

The Employer, a corporation, provides cable television and data services with a facility in Los Angeles, California, where it annually purchased and received goods valued in excess of \$50,000 directly from points outside the State of California. The Union admits and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2004 unless otherwise indicated.

II. Alleged Unfair Labor Practices

A. Background

As indicated, the Employer provides cable television and data services. At all times material to this case the Employer and the Union have been parties to a collective-bargaining agreement covering a unit of employees described in that agreement and the Employer has recognized the Union as the exclusive bargaining representative of those employees. There are about 17 employees in the unit covering classifications such as customer service and sales representatives and technicians. Rick Rogers is the Union's business representative. David Jones is the Employer's general manager.

On about July 14 Debra Bartosch, who works as a customer service and sales representative for the Employer, filed a petition with the Board seeking an election to determine whether the Union should be decertified.² Bartosch was the most senior unit employee, having worked for the Employer for about 24 years.

B. Hudgins' duties

Ken Hudgins works for the Employer and has been Union steward for about five or six years. He was elected steward by the membership and also appointed to that position by the Union's business manager. Union meetings are held every few months and the employees learn of the meetings from Hudgins. Hudgins and Rogers together conduct these meetings. Employees also contact Hudgins when they want to file a grievance and when they need information about the Union. Hudgins, however, has no authority to decide whether a grievance should be pursued to arbitration.

Hudgins routinely discusses grievances with David Jones, the Employer's general manager. Jones and Hudgins have resolved informal complaints before they are filed at the initial level. On one occasion, for example, Jones terminated a practice of allowing technicians to take their vehicles home. Hudgins protested but Jones argued that nothing in the contract required him to allow the technicians to take their vehicles home. Later Jones and Hudgins reached a compromise where technicians were again able to take their vehicles home but they acknowledged that this was a privilege that could be revoked by Jones. However, Jones deals with Rogers, not Hudgins, on grievances that are filed at the formal steps of the grievance procedure.

C. October 14

On October 14 the employees met at a restaurant. The employees learned of the meeting from a written notice distributed to them by Hudgins. The meeting was set to begin at 6:30 p.m. but actually started around 6:45 p.m. and lasted about an hour. About 15 employees attended and some left before the meeting completely ended. Hudgins began the meeting by reporting to the employees on the status of the discharge of former employee Rick Parker.

² The complaint alleges and the answer admits that the petition was filed on July 14. In his brief, however, the General Counsel cites Bartosch's testimony that the petition was filed in June. I select the formal pleadings as the more accurate date on which Bartosch filed the petition.

Hudgins then discussed the charges that the Union had filed against the Employer; those charges involved David Jones, the Employer's general manager.

5 Hudgins then referred to his past service in the military and that he knew going in what he was getting into and when the military no longer met his needs he left. He told the employees they knew that if they wanted to work for the Employer it was a union shop and they would be union members, otherwise they should find work elsewhere. Hudgins then showed the employees copies of the Union's by-laws with portions highlighted and said that he had a document with him and in that document Hudgins said that he charged Bartosch with a fine of 10 \$800. Hudgins also said that Bartosch could lose her job with the Employer if she did not sign another document. Hudgins said he was doing this because Bartosch signed the decertification petition. Hudgins showed the document to Bartosch and asked her to sign it. He commented that it was nothing personal and that he loved Bartosch like a sister. Bartosch explained that the document he wanted Bartosch to sign was to stop the decertification process. Bartosch 15 refused to sign it. Hudgins gave Bartosch a copy of portions of the Union's bylaws. Included was Article 25, entitled "Misconduct, Offenses and Penalties," Sec. 1(e) that reads:

Engaging in any act or acts which are contrary to the member's responsibility toward the I.B.E.W. or any of its L.U.'s as an institution, or which interfere with the performance by 20 I.B.E.W. or a L.U. with its legal or contractual obligations.

The words "Engaging in any act or acts which are contrary to the" were highlighted in yellow. Another part that was partially highlighted in yellow read:

25 Any member convicted of any one or more of the above-named offenses may be assessed or suspended, or both, or expelled.

It was about this time that Rogers arrived; he had been delayed by traffic. Rogers looked at the employees and asked how they could have done this, referring to the 30 decertification petition. Rogers looked at Sarah Johnson, an employee, and said that he thought Johnson was one of the more intelligent ones. Johnson did not reply. Rogers also told Bartosch that the Union's attorney was highly disappointed in her. This was in reference to the fact that the Union had successfully pursued a grievance to arbitration for Bartosch in 1996. Bartosch responded that she was doing it for everyone and not just for herself and that she was 35 "standing up for her girls." Bartosch asked Rogers why he was not the person filing the charges against her. Rogers replied that it was for Hudgins to bring up.

Another employee, Jana Brown, asked Rogers and Hudgins to allow Bartosch two more weeks to decide whether or not to sign the paper that Hudgins had asked her to sign. Hudgins 40 replied that he would give them one week. Brown went out the back door of the restaurant to have a cigarette. Bartosch and Rogers joined her. Brown told Rogers that she thought it was very unfair, that she had no intention of voting against the Union and she was not the only person who felt the same way. Bartosch said that she felt embarrassed because Rogers had brought up her earlier arbitration case. Brown again asked for two weeks to think about the 45 matter, but Rogers said that it was Hudgins' decision. Brown returned to the meeting room. This time Hudgins said that the charges had already been sent to the Union but that he would wait two weeks for the employees to talk about it.

Bartosch asked Rogers what would happen if the charges were filed against her. 50 Rogers answered that Bartosch would have to go to court and if she was found guilty she would have to pay the fine and also might lose her job. Bartosch never received any charges filed against her with the Union.

D. Credibility

The foregoing facts are based on a composite of the credible testimony of Sarah Johnson, Debra Bartosch, and Jana Brown. At the time of the hearing Johnson was employed by the Employer doing accounts payable and dispatching. She has worked there for about 2 ½ years. She is also a member of the Union. As indicated above, Bartosch worked for the Employer for about 24 years and has been a member of the Union for that period of time also. Brown has worked for the Employer nearly four years and likewise has been a member of the Union for that same period of time. Brown impressed me with her ability to answer questions about matters within her knowledge and was careful to indicate when she had no knowledge of the information sought by the examiner. Although Bartosch was at times combative, she nonetheless testified in a manner showing her comfort with the facts that she was recounting. Likewise Brown impressed me as someone who had a good recollection of the events of October 14. Moreover, it appears from her testimony that Brown would have been a supporter of the Union had an election been conducted. Importantly, all three witnesses in general corroborated each other. While each version of the events of October 14 is somewhat different, I find it only natural that the witnesses would recall parts of the meeting that particularly pertained to them. And because side conversations broke out during the meeting it is plausible that some witnesses may not have heard everything that Hudgins and Rogers said. I have also decided to credit the testimony of David Jones. He impressed me as truthful, especially concerning the details of how he interacted with Hudgins. Finally, I note that Hudgins was not called as a witness.

I have considered the testimony of Rogers but I have decided not to credit his testimony to the extent that it is inconsistent with the facts set forth above. Rogers admitted that there was discussion of the decertification petition and withdrawal of that petition at the October 14 meeting. He denied he told anyone that the charges being filed against Bartosch were because of the decertification petition that Bartosch had filed. He claimed that Hudgins said that Bartosch might be terminated from *membership* in the Union for filing the decertification petition, but no other witness made such a claim and it fits too easily into what Hudgins lawfully could have said to the employees to make Rogers' testimony credible. When asked whether Hudgins said that anyone could be terminated from their job Rogers' answer was "No, I am not – I do not recall (Hudgins) ever using the term terminated from their job." Rogers' difficulty answering that question was palpable and the answer he gave was both hesitant and unbelievable.

II. Analysis

A. Agency status

The Union denies that Hudgins is its agent; it argues that Hudgins was acting as an individual and not as a steward when he made the threats to Bartosch at the October 14 meeting. The evidence shows otherwise. Hudgins was both elected and appointed union steward. As such he had authority to represent the Union both to the employees and to the Employer. As Judge Paul Buxbaum recently noted in *Battle Creek Health System*, 341 NLRB No. 119, slip op. at 12 (2004),

The Board has observed that the holding of such an elective office is "persuasive and substantial evidence" of agency. *Penn Yan Express*, 274 NLRB 449 (1985). By the same token, the Board has placed great probative value on an alleged agent's position as a steward. In a case whose venerability is underscored by its outdated use of gender-specific language, the Board noted that a steward is "the first union

representative the members look to, and the man from whom they take their cues insofar as union policy is concerned.” *Teamsters Local 886*, 229 NLRB 832, fn. 5 (1977), enf. 586 F.2d 835 (3d Cir. 1978, quoting *Carpenters Local 2067*, 166 NLRB 532, 540 (1967)

Moreover, Hudgins and Rogers had conducted meetings with employees in the past where they both represented the Union. It was in this same vein that Hudgins spoke at the October 14 meeting. Indeed, it was Hudgins who informed the employees that the Union had arranged the meeting. It was also Hudgins who reported to the employees at the meeting of the status of grievances and charges involving the Union. It was obvious that he was doing this not as an individual but as a representative of the Union. When Hudgins continued then at the October 14 meeting with his threats that Bartosch could be fined and terminated because she had filed the decertification petition it continued to be obvious that he was still acting as an agent of the Union and not as an individual. *Communications Workers Local 9431(Pacific Bell)*, 304 NLRB 446 (1991).

In sum, this is *not* a case where a union member who also happens to be a steward acts as an individual in initiating internal union disciplinary proceedings against another member. Rather, this is a case where the union and the steward gave every indication that the steward was acting on behalf of the union itself in initiating the disciplinary proceedings. I conclude that Hudgins was acting as an agent of the Union within the meaning of Section 2(13) of the Act when he made his comments at the October 14 meeting.³

B. Merits

A union violates Section 8(b)(1)(A) when it fines a member for filing a decertification petition since “the effect is not defensive and can only be punitive to discourage members from seeking access to the Board’s processes.” *Molders Local 125 (Blackhawk Tanning)*, 178 NLRB 208, 209 (1969), enf. 442 F.2d 92 (7th Cir. 1971). Likewise a union violates Section 8(b)(1)(A) when it threatens an employee with discharge for filing a decertification petition. *Sheet Metal Workers Local 18 (Globe Sheet Metal Works)*, 314 NLRB 1134 (1994). As set forth above, Hudgins made and Rogers reiterated statements that Bartosch could be fired and fined because she filed the decertification. It follows that the Union thereby violated Section 8(b) (1)(A).

Conclusions of Law

By threatening to fine and fire employees because they filed a decertification petition with the National Labor Relations Board, the Union has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Union has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

³ Because I conclude that Hudgins is an agent of the Union, I find it unnecessary to address the argument made the General Counsel and Employer in their briefs that Rogers ratified Hudgins’ remarks.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

1. The Union, International Brotherhood of Electrical Workers, Local 45, AFL-CIO, Los Angeles, California, its officers, agents, successors, and assigns, shall

(a) Cease and desist from threatening to fine or fire employees because they filed a decertification petition with the National Labor Relations Board.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its union office in Los Angeles, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Union has gone out of business or closed the facility involved in these proceedings, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since October 14, 2004.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Adelphia Communications Corp., if willing, at all places where notices to employees are customarily posted.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, San Francisco, California, May 17, 2005.

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William G. Kocol
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with your employer on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten to fine or fire you because you filed a decertification petition with the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

International Brotherhood of Electrical Workers,
Local 45, AFL-CIO

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUSTNOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7123.